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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER CHARLES MONEY,

Defendant and Appellant.

E034261

(Super.Ct.No. RIF103264)

OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster,
Judge. Affirmed.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and
Rhonda L. Cartwright-Ladendorf, Supervising Deputy Attorneys General, for Plaintiff
and Respondent.

Defendant Christopher Money concedes he killed his eight-month-old son, Jalon, but claims Jalon's fatal injuries were accidental. Defendant appeals from a judgment entered following a jury conviction for assault on a child under the age of eight causing death (Pen. Code, § 273ab)¹ and second degree murder (§ 187). The trial court sentenced defendant to 25 years to life in prison.

Defendant challenges the constitutionality of CALJIC No. 2.03 and argues there was insufficient evidence to support the consciousness of guilt instruction. Defendant also complains of prosecutorial misconduct; that section 273ab, as applied, is void for vagueness and violates defendant's due process rights; and defendant's sentence constitutes cruel and unusual punishment. Defendant's contentions lack merit. Accordingly, we affirm the judgment.

1. Factual Background

During the evening on April 26, 2002, defendant called 911 and reported that his son, Jalon, was not breathing. At approximately 10:30 p.m., paramedics and firemen arrived at defendant's apartment. The police arrived shortly thereafter. When the paramedics arrived, defendant was performing cardiopulmonary resuscitation (CPR) on Jalon, who was lying on the couch. Jalon had no pulse and was not breathing.

When asked what happened to Jalon, defendant told a paramedic and the fire captain that he had left Jalon on the couch sleeping for 20 minutes while defendant was

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

in the bathroom, and then discovered Jalon was not breathing. Defendant, who was distraught and had been crying, told another paramedic that the scab on Jalon's forehead was from a day or two ago, when Jalon was at his babysitter's house.

Defendant told Riverside County Police Officer Eubanks that, after he and his two sons, Jalon and Kylan, returned home from visiting his wife at the hospital, he put the boys on the couch and they fell asleep. He went to the bathroom for 20 minutes and then found Jalon on the couch with spit up around his mouth. Defendant called 911 and attempted CPR on Jalon, but he was unresponsive. Defendant said Jalon had been sick a couple days before, spitting up and vomiting. Defendant said that four months before the incident, he had noticed the same substance around Jalon's mouth and called 911. At that time, fire personnel arrived, evaluated Jalon, and concluded Jalon did not need further medical treatment.

Paramedics transported Jalon to Corona Regional Medical Center. On the way, paramedics revived Jalon's heart and obtained a pulse. Shortly after Jalon arrived at the Corona Regional Medical Center, Jalon was flown to Loma Linda University Medical Center (Loma Linda).

At Loma Linda, Dr. Clare Sheridan Matney, a pediatrician specializing in child abuse, examined Jalon. According to Dr. Matney, Jalon appeared to be brain dead, and had severe injuries, including swelling on the left side of his head, circular bruises on the right side of his head, an older scrape on his forehead, a bruise and scrape on his jaw, scrapes on his neck, base of his skull, below his knee, and running down his upper left

arm, bruises on his right thigh and back, a scrape and cut below his knee, a lot of bleeding on the back of his left eye, and a cut on his lower lip. X-rays also showed a healing left leg fracture. Jalon also had a damaged liver. His skull was fractured and his brain was extremely swollen and bleeding. His head injuries caused his brain death.

Dr. Matney testified that Jalon's injuries were not consistent with injuries caused, as defendant suggested, by shaking Jalon to awaken him and accidentally hitting Jalon's head on the wall, or when defendant stubbed his toe and fell while carrying Jalon, possibly causing Jalon's head to hit the sink or the floor.

Dr. Matney concluded Jalon had been abused and his injuries were intentional, not accidental. His injuries were consistent with Shaken Infant Syndrome. Jalon's skull fracture was caused by his head being slammed or whacked against something hard and his circular bruises were from being repeatedly punched with a fist in the head. Dr. Matney testified that she could not envision any other situation causing Jalon's numerous severe injuries other than Jalon falling from a high rise onto concrete or defendant dropping Jalon on concrete while running.

While at Loma Linda on April 27th, defendant told Detective Scott Currie that during the afternoon the day before, he had gone to the hospital to visit his wife, who had sickle cell anemia. She had been hospitalized for about two and a half weeks. That day, defendant had been exclusively responsible for his two sons' care. A few days before, Jalon had had a fever but it had subsided. Defendant said that when he noticed Jalon was not breathing, defendant attempted to awaken Jalon by slapping and gently shaking him.

When shaking Jalon, he might have hit Jalon's head against a wall.

When Detective Currie told defendant Jalon had a skull fracture, defendant said he could have bumped Jalon against the car door jamb, but then said that probably did not occur. Defendant said Kylan might have hit Jalon on the head with drinking glasses or with a wagon that evening. When Currie told defendant Jalon was brain dead, defendant said nothing else happened.

On April 30, 2002, Dr. Steven Trenkle performed an autopsy on Jalon. He found extensive internal scarring in Jalon's abdominal cavity, blunt force injury to both of Jalon's kidneys, which had occurred more than a month before, and scabs on his shoulder, head, forehead, and knee, which were at least a week old. Jalon had a skull fracture emanating from his left ear, extensive soft tissue damage, and scalp hemorrhages, which could have been caused by slamming or vigorously shaking Jalon. Jalon's brain injury indicated Jalon's head had struck a solitary, firm object or was caused by a strong blow to his head.

Dr. Trenkle concluded Jalon died from the blunt force head injuries caused by another person. He also concluded Jalon's injuries could not have been caused, as defendant had suggested, by Kylan hitting Jalon with a wagon or drinking glasses, from Jalon falling off the couch, from hitting his head on the car door jamb, or from defendant tripping and falling onto the kitchen floor while holding him. Jalon's head injuries could have occurred from both a blow to his head, causing the skull fracture, and vigorous shaking, causing the subdural hemorrhaging. Both injuries occurred the day Jalon was

taken to the hospital.

2. CALJIC No. 2.03

Defendant argues the trial court erred in giving the jury CALJIC No. 2.03. The People contend defendant waived the right to object to this issue because defendant failed to assert it in the trial court.

An appellate court may review any instruction given, even though there was no objection made in the trial court, if substantial rights of the defendant are affected, “i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error.” (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249; § 1259.) Here, defendant argues the instruction: (1) infringes on defendant’s state and federal constitutional due process rights by improperly shifting the balance of instructions against defendant, and (2) is unsupported by evidence of consciousness of guilt.

Defendant’s first contention affects his substantial rights and, if true, could result in reversible error. Defendant’s first contention is thus reviewable by this court. The second contention is reviewable as well since defendant objected to the instruction, although without stating specific grounds. The trial court immediately responded to the objection by stating there was sufficient evidence to support the instruction. The court thus considered the sufficiency of evidence supporting the instruction even though defense counsel did not specify insufficiency of evidence as a ground for objecting. Stating the ground would not have made any difference. We thus consider defendant’s

challenges to CALJIC No. 2.03 on the merits.

Preliminarily, we note that the California Supreme Court repeatedly has rejected claims that consciousness of guilt instructions, including CALJIC No. 2.03, violate due process by bolstering the prosecution's theory or lessening the prosecution's burden of proof. We thus reject defendant's constitutional challenge to CALJIC No. 2.03. (*People v. Cain* (1995) 10 Cal.4th 1, 34; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1136, 1141; *People v. Medina* (1995) 11 Cal.4th 694, 762.)

As to defendant's second contention, we conclude there was sufficient evidence to support the instruction. An instruction must be given only if it is supported by substantial evidence. Instructions on unsupported theories should not be given to the jury. (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) Doubts as to the sufficiency of evidence warranting an instruction should be resolved in favor of the defendant. (*People v. Duckett* (1984) 162 Cal.App.3d 1115, 1125.) Giving CALJIC No. 2.03 is justified when there is evidence that, before being charged, the defendant prefabricated a story to explain his conduct. (*People v. Williams* (1995) 33 Cal.App.4th 467, 478; *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103.) Such evidence shows consciousness of guilt, thus justifying use of CALJIC No. 2.03. (*People v. Amador* (1970) 8 Cal.App.3d 788, 791-792; *People v. Cooper* (1970) 7 Cal.App.3d 200, 205.)

CALJIC No. 2.03, as given to the jury, states: "If you find that before this trial the defendant made a false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending

to prove a consciousness of guilt; however, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.”

Over defendant’s objection, the trial court explained the instruction was appropriate because there was a basis for the jurors concluding the statements defendant made explaining Jalon’s injuries were false.

Defendant argues that his statements to the 911 dispatcher, paramedics, and officers, regarding the circumstances leading to Jalon’s injuries, did not justify giving CALJIC No. 2.03. Defendant claims he did not admit anything and there was very little, if any, evidence that he willfully provided false or misleading pretrial statements. We disagree. Defendant’s statements to the 911 dispatcher, paramedics, and officers could reasonably be construed as inconsistent, evasive, and false. Defendant gave differing explanations of how Jalon’s injuries occurred, and the medical experts found none of defendant’s explanations viable in light of the nature, severity, and pervasiveness of Jalon’s injuries. Defendant’s explanations changed and evolved as officers progressively informed him of the severity of Jalon’s injuries and condition.

Defendant initially mentioned Jalon received the scab on his forehead while at the babysitter’s and that Jalon had been sick. Defendant then gave other explanations, such as he might have accidentally hit Jalon’s head on the wall when gently shaking him to awaken him; he might have bumped Jalon’s head on the car door jamb; Jalon’s four-year-old brother might have hit Jalon in the head with drinking glasses or a wagon; or Jalon might have hit his head on the sink or floor when defendant stumbled in the kitchen while

carrying him.

Expert testimony that Jalon's injuries were consistent with Shaken Infant Syndrome and physical child abuse, along with defendant's evolving and contradictory statements explaining how Jalon might have been injured, provide substantial evidence that defendant fabricated various explanations for Jalon's injuries to divert suspicion from himself. CALJIC No. 2.03 was thus appropriate.

3. Prosecutorial Misconduct

Defendant argues the prosecutor committed misconduct during closing argument by shifting the prosecution's burden of proof to defendant to prove his innocence.

In order to prove misconduct, defendant must establish that the prosecution's behavior at trial was below the standard of behavior for prosecutors. Prosecutors are generally given wide latitude in arguing a case so long as the argument "amounts to fair comment on the evidence. . . ." (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396; see also *People v. Hill* (1998) 17 Cal.4th 800, 819.) The prosecution also has "broad discretion to state its views as to what the evidence shows" (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1052; see also *People v. Welch* (1999) 20 Cal.4th 701, 752.) However, a prosecutor's conduct "violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to

persuade either the court or the jury.” [Citations.]” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215; see also *People v. Hill, supra*, 17 Cal.4th at p. 819.)

Defendant complains that the prosecutor argued: “There’s no medical explanation for what the defense is asking you to accept. And they’ve offered no explanation, have they?” The prosecutor a little later argued, “And you’ve got to ask yourself is there any basis, any contrary evidence for you to disbelieve what they said? Has there been any basis given to you to discount the testimony of Dr. Trenkle, to discount the testimony of Dr. Matney? Absolutely none.”

Defendant argues that these statements implied that defendant had the burden to prove his accident defense beyond a reasonable doubt in order to establish his innocence. This, in turn, diminished the prosecution’s burden to prove each element of the charged offenses. Defendant acknowledges defense counsel did not object to the prosecutor’s statements in the lower court. Defendant, however, argues there was no waiver of his objections because the misconduct was so egregious that the misconduct could not be cured. Therefore an objection would have been futile. We do not agree. Had defendant objected, assuming the statements were improper, the court could have provided a curative instruction reminding the jury that the prosecution had the burden of proof.

Alternatively, defendant argues that, even if there was a waiver, defense counsel’s failure to object constituted ineffective assistance of counsel. Regardless of whether defendant waived his prosecutorial misconduct objection, defendant’s contention lacks merit. The prosecutor’s statements regarding the medical evidence, made during rebuttal,

were proper. The prosecution presented medical expert testimony stating that Jalon's injuries were so severe that they could not have been caused by merely dropping the child during a fall.

Defense counsel conceded the severity of Jalon's injuries and that defendant caused them. However, defense counsel urged the jurors to disregard the doctors' expert testimony and find that defendant accidentally caused Jalon's injuries when he tripped and fell while carrying him.

In light of defense counsel's closing argument, the prosecution's rebuttal argument was entirely proper. There was no impropriety in the prosecutor arguing defendant had not provided any evidence refuting the medical expert evidence.

4. Constitutionality Challenge to Section 273ab

Defendant contends that, as applied to the facts of this case, section 273ab is impermissibly vague and violates his equal protection rights.

Section 273ab provides: "Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. Nothing in this section shall be construed as affecting the applicability of subdivision (a) of [s]ection 187 or [s]ection 189."

A. Vagueness

Defendant argues the statute is vague as to whether there was a section 273ab

violation because even medical experts disagree as to whether Shaken Infant Syndrome can cause or is likely to cause great bodily injury (GBI) in an eight-month-old child.

Defendant also complains that the statute does not require the perpetrator to intend to inflict GBI. There need only be general intent to commit the acts resulting in GBI, as opposed to subjective intent to inflict GBI. In addition, the same shaking conduct constitutes the basis of both the assault conduct and the conduct found likely to cause GBI.

A statute is presumed valid and upheld unless it is positively and unmistakably demonstrated to be unconstitutional. (*People v. Basuta* (2001) 94 Cal.App.4th 370, 397 (*Basuta*).) In determining whether a statute is unconstitutional for vagueness, “the question is whether the statute provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides police and prosecutors with sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement.” (*Id.* at p. 397, citing *People v. Albritton* (1998) 67 Cal.App.4th 647, 656-657.)

The court rejected the defendant’s constitutional vagueness challenges to section 273ab in *Basuta, supra*, 94 Cal.App.4th at page 397 and *People v. Albritton, supra*, 67 Cal.App.4th at page 658. In *Basuta*, the defendant, a daycare center operator, was convicted of assaulting a child with force likely to produce GBI resulting in death. (§ 273ab.) The prosecutor presented evidence that the victim, a 13-month-old child, died from injuries caused by Shaken Infant Syndrome.

On appeal, the defendant in *Basuta* argued section 273ab was vague as applied to

the defendant, and the defendant's sentence for the offense violated the defendant's equal protection rights. The *Basuta* defendant argued the statute was void for vagueness because (1) the experts disputed whether shaking alone could cause, or was likely to produce, GBI in a 13-month-old child, and (2) "given the lack of a requirement for subjective intent to inflict GBI." (*Basuta, supra*, 94 Cal.App.4th at pp. 396-397.)

In rejecting these arguments, the *Basuta* court explained that "section 273ab is not [a Shaken Infant Syndrome] offense. Appellant's observations concerning scientific disagreement about the validity of [Shaken Infant Syndrome] are irrelevant to the issue of the requisite specificity of section 273ab. Section 273ab makes clear that it is unlawful for one with custody of a child to assault that child by 'means of force that to a reasonable person would be likely to produce [GBI].' It is the jury's evaluation of the reasonable likelihood of *some* [GBI] that is crucial, not the technical mechanism of any particular harm. While the existence or nonexistence of [Shaken Infant Syndrome] or any other mechanism or injury might impact the issue of causation, or the sufficiency of evidence in a given case, it does not affect the basic specificity of section 273ab." (*Basuta, supra*, 94 Cal.App.4th at pp. 397-398.)

Defendant's other objection to section 273ab, that the statute does not require subjective intent to cause GBI, was rejected in *People v. Albritton, supra*, 67 Cal.App.4th 647. In *Albritton*, the court explained that section 273ab is a general intent crime in which the gravamen is the likelihood that the force applied or attempted to be applied will result in GBI. (*Id.* at p. 659.) The criminal law independently sanctions the

“assault” because it directly and immediately culminates in injury. Such offense thus only requires an intent to commit the proscribed act. (*Ibid.*) “Whether the intended act in its nature is one likely to produce great bodily harm is a question for the jury. It is not required that the actor intend to produce [GBI] or death, nor is it required that he know or should know the act is intrinsically capable of causing such consequences.” (*Ibid.*)

In accordance with *Basuta* and *Albritton*, we reject defendant’s vagueness challenge to section 273ab as applied to the instant facts.

B. *Equal Protection*

Defendant notes that his 25-years-to-life sentence for violating section 273ab is equivalent to a sentence for premeditated first degree murder of a child, yet his subjective intent need only be the intent required for a simple assault or an implied malice second degree murder. Defendant argues that it is nonsensical to equate the conduct of shaking an infant in a moment of anger with that of cold-blooded premeditated child murder. Defendant complains that a much harsher penalty is imposed upon a child care provider under section 273ab than other equivalent conduct which is not committed by persons acting in a child care capacity. Therefore, the statute cannot survive the compelling interest constitutionality analysis required for imposing the same harsh punishment on a person who shakes a child, accidentally resulting in the child’s death, as that of a person who premeditatedly or maliciously murders a child.

This same equal protection challenge to section 273ab was raised and rejected in *Basuta*. In concluding the defendant was not denied equal protection under section

273ab, the *Basuta* court reasoned that the defendant “is not similarly situated with those who murder children. A violation of section 273ab requires not only an assault on a child that results in death but also that the defendant have care or custody of the child. The element of care and custody in section 273ab creates a meaningful distinction between those committing that offense and murderers. Those who have the care and custody of children not only have a particular responsibility and occupy a position of trust, they are also the persons most likely to kill children.” (*Basuta, supra*, 94 Cal.App.4th at p. 399.)

The *Basuta* court further concluded that the rational relationship test applied, rather than the strict scrutiny test, and “treating murderers and those who violate section 273ab differently bears a rational relationship to a legitimate state interest.” (*Basuta, supra*, 94 Cal.App.4th at p. 399; see also *People v. Wilkinson* (2004) 33 Cal.4th 821, 838.)

In accordance with *Basuta*, we reject defendant’s equal protection challenge to section 273ab. Defendant’s conduct was not accidental. He committed intentional acts, resulting in killing Jalon. Defendant’s sentence was rationally related to the legitimate state interest of protecting vulnerable children from childcare givers and parents committing such intentional acts. Defendant’s sentence is justifiably harsh. It is not a violation of defendant’s equal protection rights.

5. Cruel and Unusual Punishment

Defendant contends his 25-years-to-life sentence constitutes cruel and unusual punishment under the state and federal Constitutions. Defendant argues he should have

received a lesser sentence because he had a minimal level of culpability, with no prior criminal juvenile or adult history. His sentence, he claims, is “grossly disproportionate to the offense for which it is imposed.” (*People v. Dillon* (1983) 34 Cal.3d 441, 478.)

We disagree. There was substantial evidence defendant killed his eight-month-old son by violently shaking the infant and by whacking the head of an innocent, helpless infant. There was also evidence Jalon had been physically abused several times before. We cannot say defendant’s 25-years-to-life sentence for killing Jalon “shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.) Even in comparison with sentences for other heinous crimes, such as premeditated murder or torture, defendant’s sentence is not cruel and unusual. (*People v. Norman* (2003) 109 Cal.App.4th 221, 230.)

6. Disposition

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/McKinster
Acting P.J.

s/Richli
J.